No. 4486

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CRYSTAL COPPER COMPANY, a Corporation,
Plaintiff in Error,

vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

Brief of Defendants in Error

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BESSETTE-STORK CO., PRINTERS

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ARGUMENT

There is no conflict of evidence in this case on the material issues, and the evidence is in support of the allegations of the amended complaint. The facts in this case are quite fully set forth in the Briefs of both, the Plaintiff in Error and the Cross-Plaintiffs in Error, and we, therefore, shall not make any supplemental statement of facts herein.

For the sake of brevity, we will herein call the Plaintiff in Error, the corporation or company, and the Defendants in Error, the co-partners or partnership.

MINING PARTNERSHIP.

The corporation is attempting to raise a question of reversable error on the co-partners in this case, that they are not a mining partnership, because it claims they are not the owners of a mining claim or of an interest therein. The opinion said corporation relies mostly upon to sustain its contention, is, Michalek, vs. New Almaden Co., written by Mr. Justice Haven of the District Court of Appeal, First District, Division 2, California, reported in 184 Pac. 56. A study of that opinion, as well as the other authorities quoted from and cited by the corporation, sustain our position and contention in the case at bar, that the co-partners herein were and are a mining partnership, particularly wherein that opinion says, *"the ownership of an interest in a mine or the right to the possession thereof,————is a prerequisite for the existance of such a partnership."*

It appears from said opinion, that the miners in that case, after cleaning out and re-timbering an old tunnel, went to work on ore already discovered and were to receive a certain pay or wage per ton for the ore they extracted, which is the same system of measurement of wages as is often used in coal mines, where the miners are put to work on coal veins already discovered, exposed and worked by the mine owner himself. The miners in the case of Michalek, vs. New Almaden Co., supra, were not bound to work any specified time or amount of territory, but could stop whenever they wanted to, and there was no agreement that the miners were to acquire any interest in the mine, nor the ore when it was taken out; but they were to deliver

it to the defendant and to receive compensation for their work at the rate above specified." ($6.00 per ton).

In the instant case it is alleged that the said co-partners had an oral sub-lease of a certain portion of the Goldsmith Mine, (Tr. 5) with the exclusive possession thereof in said co-partners, (Tr. 5) for certain royalties if ore was discovered and extracted, (Tr. 6) and the uncontradicted evidence supports all of those allegations of the amended complaint. (Tr. 54-88, 111 and 126). The co-partners, according to the said facts, had the exclusive possesion of the leased ground from the 26th day of June, 1921, to the 16th day of January, 1922, and during that time they discovered ore, and they shipped 10 railroad carloads of ore from their development work in the leased ground and received the written returns from the smelter on 8 carloads. On the back of those 8 smelter returns and the other 2 also, Mr. Alderson, General Manager of said corporation, designated the co-partners' part thereof, as "Leasers One-half" (Tr. 65, 68, 71, 74, 78, 81, 82, 84, 87, and 150). In the handwriting of the manager, said co-partners were called leasers at various times covering a period of about six months, and said corporation received thousands of dollars as royalty or rent from said smelter returns of ore shipped, and it acknowledged the receipt of these royalties or rents in the handwriting of its Manager, Matt. W. Alderson. (Tr. 74, 135-136).

The allegations of the amended complaint and the uncontradicted evidence in support thereof show, that the said co-partners did not start to work in pay ore, but on the contrary show that they started to prospect the leased

ground for ore and were fortunate enough to find valuable ore after a month's work by four men. If the aforesaid facts do not satisfy the following Section of the Revised Codes of Montana of 1921, word for word the same as Section 2511 Calif. Civ. Code, then no facts will satisfy said Section to form a mining partnership, to-wit:

> "A mining partnership exisits when two or more persons own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." Rev. Codes of Mont., 1921, Sec. 8050.

The other authorities cited and quoted from by the said corporation, is 17 Calif. Jur., under the head of "Mines and Minerals", Secs. 106 and 107; and said Sec. 106 is in part as follows:-

> ", nor is it necessary that the property be owned in fee by the partners, *if they have an interest therein, or a right to possession of the property* or to acquire its ownership."

The uncontradicted facts mentioned above, show that the co-partners had the possession and were entitled to the possession of said portion of the Goldsmith Mine at the time three of them were ejected by the said corporation, to-wit, Janauary, 16th, 1922, from said leased portion of said Mine. *Besides the said co-partners having the possession of said portion of said Mine, they had an interest in that portion of the Mine, to-wit, a sub-lease, or in other, words, a leasehold, or what is termed an estate for years.*

The Supreme Court of the United States in a very recent opinion, held that a mining lease does not convey the title

to the unextracted ore deposits, but creates a very substantial interest in a mine or mining claim, and that opinion is in part as follows:-

> "It is, of course, true that the leases here under review did not convey the title to the unextracted ore deposits (Cases cited) ; but it is equally true that such leases, conferring upon the lessee the exclusive possession of the deposits and the valuable right of removing and reducing the ore to ownership, created a very real and substantial interest therein. (Cases cited). And there can be no doubt that such an interest is property." (Cases cited).

Margaret C. Lynch, Executrix etc, v. Alworth-Stephens Co., United States Supreme Court Advance Opinions, 69 L. Ed. 295, 297 No. March 16, 1925.

If the construction, by the corporation, of the said section 8050 Rev. Codes of Mont. 1921, is the law, then in order to have a mining partnership, persons would have to have a written contract for some kind of a present or future legal title in a mining claim, or be the owners in fee thereof; in other words, the Statutes of Fraud would apply to the formation and existance of a mining partnership, which this Court has held is not a requirement of a mining partnership, in the case of Whistler vs. MacDonald, 167 Fed. 477; 93 C. C. A. 113.

Suppose the mine or mining claim leased was an unpatented mining claim, where the lessor has only a possessory right and the Government has the legal title, couldn't such a mine or mining claim be the basis of a mining part-

nership, or can mining partnerships be formed only on patented mining claims? The legal title of the corpus of the ore in place is not transferred and need not be transferred by the parties in order to form the basis of a mining partnership, according to said statute on mining partnerships.

THE DECISION OF A MAJORITY OF MINING CO-PARTNERS GOVERN.

The counsel for said corporation contend that a majority of a mining partnership controls or governs the partnership under Section 8059 of the Revised Codes of Montana, 1921, which is as follows:-

> "The decision of the members owning a majority of the shares or interest in a mining partnership binds it in the conduct of its business."

We are glad that the counsel for the corporation mentioned this provision of the Montana Codes, and we agree with them on this question as an abstract proposition of law. The facts in the instant case show that three of the five co-partners were ejected from and kept off the leased property. They were the three who decided to institute this action, and the actions and decisions of the minority, or individual partners, to the contrary not with-standing. There being a co-partnership, the action should therefore be prosecuted by the co-partnership in the names of all the co-partners, and the verdict should have been in the names of all the co-partners, particularly when the evidence shows that there has not been an accounting and dissolution.

Stuart vs. Adams, 89 Calif. 367; 26 Pac. 970.

Barker vs. Abbot et al, (Tex) 21 S. W. 72.

30 Cye. 565.

The purported release by Lawrence Monzetti, as an individual, is discussed in our brief in the instant case under the Cross-writ of Error, reference to which is hereby made. If the corporation may introduce a purported release of an individual in evidence in an action by a partnership, without pleading such a release and over the objections of the co-partnership, which purported release of an individual apparently was obtained without consideration, through trickery, fraud and deception, then the rules of pleading and evidence are set at naught, substantive law over ridden, and a court action becomes a mockery.

LEASE OR LICENSE: STATUTE OF FRAUDS.

Counsel for said corporation contend that there was a lack of mutuality in the sub-lease between said corporation and the co-partnership. The facts in the instant case show that the co-partners agreed to do certain amount of work in certain ground of the Goldsmith Mine in searching for ore, and in case marketable ore was discovered and mined, then both the co-partners and the corporation were to divide the returns from the smelter, with the corporation, the lessor, getting the long end of the deal. (Tr. 54, 55 and 56). If the co-partners had not done the work they had agreed to do in searching for ore, they certainly could have been sued for damages by the corporation for not performing their part of the lease. On the other hand, if the corporation would not carry out its terms of the lease, and if it ejected or interferred with the co-partners in the prosecution of their work under said lease, then of course the corporation could be sued for damages, and

it is sued herein for its violations of said lease.

The amended complaint and the proof in support thereof show, that on the 26th day of June, 1921, the co-partners forthwith commenced to work under the said lease and diligently prosecuted their part under the lease, personally and by hired help. (Tr. 17, 18 and 57-87). If the foregoing facts do not show mutuality, then there is not and can not be mutuality in any lease.

The corporation also claims, no time was specified for the performance of the terms of the lease. The evidence shows that the co-partners went to work under said lease immediately and continued to work thereunder for about seven months. There is of course implied covenants in leases, and one of the implied covenants in a mining lease is to keep at work.

> Morrison's Mining Rights, page 364, (Covenants to work).

The evidence further shows that by six miners working, the same as the co-partners had done for six months, could have fully performed the terms of said lease in not more than three months from the 16th day of January, 1922. The statutes of Montana provide, that if the period of time is not specified in a lease, it is presumed to be for one year.

> Sec. 7743, Rev. Codes Mont., 1921.
>
> Giovanetti vs. Schab, 41 Mont. 297, 302; 109 Pac. 141.

The counsel for the corporation claim that the co-partners did not have exclusive possession of the sub-leased portion of the Goldsmith Mine. There is no evidence to

show that they did not have exclusive possession thereof, and the following evidence shows, without contradiction, that they had such possession of said sub-leased portion of the mine, to-wit:-

Pete Gadio testified as follows:-

> "After we sank the winze and got through with it us five partners were working together and nobody else, but after that there was a boy working for us, John Ardenson was working there for us five partners, and we paid him five dollars and twenty-five cents a day."
>
> "In my opinion it would take about thirty days to have stoped out the ore left in the hanging-wall lead at the time we were ejected from the lease on January 16, 1922, with six of us working there. In the footwall lead it might give us more trouble, but in my opinion it would take about forty days to have stoped out the ore there, or forty-five days, six men working. There was nobody else working in the drift and in the cross-cut and in the winze besides us five partners and Mr. Ardenson when we were working there. We were the only ones working there, the only ones taking out ore."
>
> (Tr. 126-127).

Mr. Monzetti testified as follows:-

> "We worked a little over two months I guess in the winze and drift under the 500-foot level, under the lease in this case, before we shipped any ore. We were doing dead work. Nobody else worked in that winze and drift in the place we were working, be-

sides our five partners in the time between the 26th day of June, 1921, and the 16th day of January, 1922, except the man we hired there. Nobody else besides my partners took out any ore in that particular place, that is in the drift and the hanging-wall vein and in the footwall vein. We shipped the first carload of ore around in August some time."

(Tr. 111).

"Three of us were working on each shift. We had another man working besides the five partners, a man by the name of John Ardeson; and paid him wages. The partners paid him, the five of us. We started to work two shifts around the middle of August, and paid Mr. Ardenson about five dollars and a quarter. The average wage scale in this camp at that time was four dollars seventy-five cents a day. I did not receive any wages when I worked up there."

(Tr. 110).

These uncontradicted facts, in our opinion, conclusively show that the co-partners were in exclusive possession of the place they had under sub-lease and were working. Besides this evidence there is a great deal of evidence on this point that the said co-partners had exclusive possession of the sub-leased ground. If they had not been in exclusive possession of said place, the defendant would certainly have produced such evidence.

The counsel for the corporation contend that the co-partners had no oral lease, but merely held a license revocable at pleasure,- particularly a pleasure to the corporation managment and revocable when the development work

had been done by the co-partners and there were high ore values in a three to four feet vein, discovered and exposed by the co-partners, in the drift and stopes of the leased ground. Under the title of lease or license, the counsel for the corporation labor through about three-fifths of the space of their argument in their brief, by citing and quoting from text books and opinions on varying facts in different cases in different juisdictions, on what has been held to be a license and not a lease, and contend that there can't be a parole mining lease.

We do not contend that there is not such a thing as a license to mine, or working contract to mine. To the contrary we concede that there is such a thing as a license to mine, a labor contract to mine, and a lease to mine. We concede that there can be a written license to mine, a written labor contract to mine, and a written mining lease. We further concede that there can be an oral license to mine, an oral labor contract to mine, and an oral mining lease. The cases cited and quoted from by the counsel for the corporation in their brief, are cases on licenses and labor contracts. None of them hold that there is not or can not be a written or parole mining lease. After going into the question of a mining lease, with a Montana case on the question of a mining lease directly in point, we desire to call the courts attention to the case cited and quoted from, by the counsel for the corporation in their brief, and show wherein they are distinguishable from the case at bar.

The Supreme Court of the State of Montana, in the case of Pelton vs. Minah Consolidated Mining Co., 11 Mont. 281; 28 Pac. 310, as far as Montana is concerned, has

held that there is such a thing as a mining lease, and shows what terms and conditions make a mining lease. If certain terms and conditions make a mining lease and there is such a thing as a mining lease, then of course the general Statutes of Montana on leases apply to mining leases.

17 Cal. Jur., page 425, sec. 97.

In the Pelton case, supra, the Minah Consolidated Mining Co. owned a mining claim. One, Mr. Swan, obtained a lease thereon and worked the same. In working the said claim, Mr. Swan employed a man by the name of Mr. Pelton, the plaintiff in said case. Mr. Pelton was not paid in full by Mr. Swan and therefore attempted to place a mechanic's lien against said mining claim and attempted to foreclose it against the said company. The Supreme Court of the State of Montana in that case held,———— "the" (Legislative) "act above cited whereby it was provided, in effect, that the interests of proprietors in leased premises could not be charged with a lien for labor performed thereon for the use and benefits of tenants or lessees. Therefore, said Swan being lessee of said premises, we must hold, under the provisions of said statute, that the interests of the appellant" (mining company) "therein are not subject to the lien sought to be enforced against it in this action."

The terms of the lease of Mr. Swan, were substanially the same as those of the co-partners in the case at bar. The only differences between that and the case at bar, are, that the period of time in the Pelton case was fixed by time, one year, and in the instant case was fixed by the amount of territory to be worked; and that the lease in the Pelton case

was in writing, and the one in the instant case is verbal.

It is elementary that parole leases are just as legal and valid as written leases in the State of Montana, where they do not conflict with the Statutes of Frauds, and if they are in conflict with the Statutes of Frauds and the tenant is in possession, the tenancy becomes a tenancy at will, according to the case of Centennial Brewery Co. vs. Rouleau, 49 Mont. 490, 143 Pac. 969, and it is in part as follows:-

> "Other consideration aside, upon the assumption that the oral lease was wholly void, we think that in correct theory the defendants became Lavell's tenants at will. (numerous cases cited) Upon the theory, the tenancy would have been terminated by the giving of the notice prescribed in section 4502, supra; otherwise by express provision of section 4503 the action could not be maintained. As Lavell's successors, the plaintiff had no other or greater rights than he had. Rev. Codes Sec. 4521."

> "A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant in the manner prescribed by the Code of Civil Procedure, to remove from the premises within a period of not less than one month, to be specified in the notice."

Sec. 6744, R. C. Mont. 1921.

Sec. 4502, R. C. Mont. 1907.

> "After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession."

Sec. 6745, R. C. Mont. 1921.

Sec. 4503, R. C. Mont. 1907.

Referring again to the case of Pelton vs. Minah Con. M. Co., supra, the Supreme Court of Montana, on the question of a mining lease, says and quotes from several authorities as follows:-

> "In regard to what conditions constitute a lease, Mr. Justice Thompson, in delivering the opinion of the court in United States v. Gratiot, 14 Peters, 526, said: 'The legal understanding of a lease for years is a contract for the possession and profits of the land for a determinate period, with the recompense of rent. The contract in question is strictly within this definition. The business of smelting is a part of the operation of mining, although it may be a distinct branch from that of digging the ore; but the law ought not to be so construed as to require the whole operation to be embraced in the same contract. They are different operations, requiring different qualifications and distinct regulations. This contract is for possession land. etc.————
>
> "In Moore v. Miller, 8 Pa. St. 272, Mr. Justice Coulter, in expressing the opinion of the court, says: 'In estimating the language which constitutes a lease, the form of words used is of no consequence. It is not necessary that the term 'lease' should be used. Whatever is equivalent will be equally available. If the words assume the form of a license, covenant, or agreement, and the other requsites of a lease are present, they will be sufficient. (Co. Litt; Bac. Tit

'Lease', K) An agreement that Miller should enter and dig ore, build houses, etc. he to pay, as compensation to the owner of the land, fifty cents a ton of ore, was, in substance and in fact a lease.

"Bouvier defines a 'lease' to be a 'species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties' (Bouvier's Law Dict.)"

"A 'lease' is a contract for the possession and profits of lands and tenements on the one side, and the recompense of rent or other income on the other, or it is a conveyance to a person for life, or years, or at will, in consideration of a return of rent or other recompense.' (12Am. & Eng. Encycl. of Law, 976.)"

"The instrument before us contains the elements which constitute a lease, of a character and for purposes common to the mining regions of this State, and it contains no provisions or conditions whereby we can hold it to be a contract of any other nature."

Pelton v. Minah Con. Min. Co., 11 Mont. 281, 283; 28 Pac 310.

Some other authorities in point that a contract containing the same elements as the lease in the case at bar, is a lease, are the following:-

U. S. vs. Gratiot, 14 Peters 525. 539; 10 L. Ed. 573.

Reynolds vs. Hanna, 55 Fed. 783, 800.

Hyatt vs. Bank, 113 U. S. 408, 5 Supt. Rep. 573.

3 Roses Notes, page 579.

Lindley on Mines, 3rd Add., Vol. III, page 2138.

Morrison's Mining Rights, 15 Add., page 357.

17 Cal. Jur., page 424, Sec. 96.

18 R. C. L., page 1186, Sec. 96; 1188, Sec. 97.

Lyuch, Ex. v. Alworth-S. (U. S.), 69 L. Ed., 295.

Some cases holding that an oral mining lease is valid:-

Kjelsberg vs. Chilberg, 177 Fed. 109.

Ruffati vs. Societi etc., 10 Utah 386; 37 Pac. 593

Moore vs. Miller, 8 Pa. St. Rep. 272.

The counsel for the corporation have quoted from and cited many cases on licenses and working contracts, but not any of them have held that there can't be such a thing as an oral mining lease. To the contrary we have cited and quoted from several cases, holding that oral mining leases are valid. Lindley on Mines on the question of licenses and leases says the following:-

"The line of demarcation between a license coupled with an interest and a lease, and between a lease and an absolute grant of the minerals with possessory privileges, is not clearly defined. There is considerable confusion in adjudicated cases, rendering it difficult to draw any accurate or generally accepted conclusion. - - - - - -

"If certain consideration, however, are borne in mind, this confusion is found to be more apparent than real. Where the grantor is the absolute owner of land containing mineral, and so long as both grantor and grantee remain alive and sui juris, questions which come up under instruments conferring mining rights often call for adjudications only to the extent of ascertaining the respective rights of the parties to

the contract. As already pointed out, the practically important question is what are these rights, rather than what is the proper name for the instrument. A given instrument, for instance, may very properly be held a lease as between grantor and grantee; that is to say, such conclusion may be perfectly correct so far as is necessary to determine in the matter before the court;————We must therefore always keep in mind what is the question before the court, and we will find that most of the decisions are from such standpoint harmonious.

Lindley on Mines, 3rd Add., Vol 3, page 2134, Sec. 861.

Morrison's Mining Rights, says the following about leases and licenses, to-wit:-

"The material distinctions between a lease and a license are that:-

1. A license is not exclusive.

2. It invests the licensee with no property in the mineral until it is severed from the ground.

3. It may be revoked at any time.

4. It is not transferable.

"The above stated differences show that a license practically amounts to a mere priviledge to work at the owner's will. It is a permission sufficient to defeat the charge of trespass but is not that property in the soil such as parties contracting on equal terms for permanent working naturally bargain for. On the other hand, it is usually granted without any, or for a nominal consideration.

"It has been held that a lease which did not bind the lessee to work was a mere license.———Wheeler vs. West, 71 Cal. 126, 11 Pac. 871, 78 Cal. 95, 20 Pac. 45; Collins v. Smith, 151 Ala 133, 43 So. 838. But these rulings would be indefensible if the party had gone into possession under the implied covenant to work. In every lease, verbal or written, reserving royalty, there is an implied covenant to work (See p. 364) and the express obligations to work is not one of the distinctions between lease and license. The exclusive rights to mine implies a lease and not a license.———Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Stinson v. Hardy, 27 Or. 584, 41 P. 116."

Morrison's Mining Rights, 15th Add., page 374.

As stated above, the cases cited and quoted from by the counsel for the corporation in their brief, are on the question of a license or a contract for labor, and are distinguishable from the instant case. We shall take their cases one by one and show wherein they are distinguishable from the case at bar.

The case of Wheeler vs. West, 71 Calif. 126; 11 Pac. 871 is a case of an oral license to mine. The court in that case says:-

"The verbal contract of February 14, 1883, as found by the court and jury, under which defendants were to enter and work a certain portion of the mine *if they saw fit*, and to exercise their own discreation whether they worked it or not, did not create the re-

> lation of landlord and tenant between them and the plaintiffs''.

No time for to work, or amount of territory to be worked, was specified. In other words, it was revocable at will, and there was no mutuality in said contract. Both of which matters are ear-marks of a license.

The case of Shaw vs. Caldwell, (Calif.) 115 Pac. 941, is a case of a written license. In that case the plaintiff had executed a bargain and sale deed to a one-half interest in a mine in consideration of one dollar and the doing of necessary assessment work to hold the claim at the grantee's expense,. It also provided that the two grantees might work and develop the mine at their own expense, and that all gold or proceeds taken therefrom for 20 years should be divided equally among the parties; that is, each to have a one-third thereof. It was held that the provisions for working the mine apart from the doing of assessment work was a mere license to be excerised by the grantees, or not, at their election; the word 'may' not being construed to mean 'must'.

The case of Clark vs. Wall, 32 Mont. 219, 222, is another case of an oral license, and clearly so. The court, in part in that case, says:-

> "About this time (April 20, 1904) the plaintiff entered into a verbal agreement with the defendant Wall to the effect that Wall should have permission and privilege of entering the claim by the 'Tripod Shaft', and connected with certain stopes and a drift. Under this agreement, *Wall might enter into said shaft and into said workings, and might mine and*

> *extract ore from the same, during the will and pleasure and during the consent of this plaintiff, with the express understanding that said privilege, permission, or right to mine in said premises should terminate and cease, whenever or at such time as this plaintiff might desire."*

It clearly appears from said quotation from said case that there was no grant of any lease for any certain amount of territory to be worked or for any length of time. It does not contain the elements of a lease, and is only a privlege or permission to the licensee which could be terminated by the licensor at any time. It had the very ear-marks of a license.

In the case of Ivey vs. La France Copper Co. et al, 45 Mont. 71, 74, the plaintiff attempted to set up three causes of action, to-wit:- One for wages for the time he had worked in the Lexington Mine; one for the value of the ore knocked down; and the third for damages for breach of a lease. The court in that case, in part, says:-

> "After experiencing some difficulty in establishing a cause of action, other than that relating to forty tons of ore, the plaintiff practically abandoned the cause of action for breach of the so-called lease agreement in itself by testifying that Mr. Frank (manager) reserved the right to terminate the agreement by paying day's wages for the dead work."

It appears from the facts in that case as stated by the court, that the licensor reserved the right to terminate the agreement by paying the wages for the time the licensee had worked-, in other words, there was no grant of any

certain time the licensee could or should work, but the right of working there could be revoked at any time, clearly showing one of the main elements of a license.

The case of Michalek vs. New Almaden Co., supra, is a case of an oral working contract, and clearly so. The following words from said case will demonstrate that, to-wit:-

> "There was no agreement that the miners were to acquire any interest in the mine, nor in the ore when it was taken out; but they were to deliver it to the defendant and to receive compensation for their work at the rate specified. ($6.00 per ton) They were not bound to work any specified length of time, but could, stop whenever they found that they would not get enough compensation out of the ore to satisfy them."

The miners in that case had no grant of any certain territory to be worked, or any length of time to work, or any interest in the ore or the value of the ore, but merely in the number of tons extracted,-the basis on which their wages were determined.

In the case of Hudepohl v. Liberty Hill Consolidated Mining Co., 80 Calif. 553, 22 Pac. 339, the question of a mining lease or license was not the direct issued in the case That was an action to collect on a promissory note, wherein the defense of no consideration was interposed, because the miners' share of the proceeds under a mining contract, for which the note had been executed, had not been ratified by the stockholders of the defendant company, which it was claimed was required under a California Statute,

in order to make a valid mining lease, and the defendant in that case therefore claimed there was no valid consideration for the promissory note. The court in that case set out the mining contract haec verba in its opinion, and a reading of the opinion will demonstrate that the written contract shows that it was for a certain mining claim, for a certain length of time, and for certain rent, which ordinarily satisfies the definition of a lease, but the court in that case, without discussing the elements which constitute a lease, license, or working contract, says:-

> "If the agreement could be construed to be a lease of real estate of the defendant, it may be conceded that the point made against its validity would be well taken; but we do not regard it as a lease. It is true the parties so term it in the instrument itself, but that cannot affect its legal construction. As we construe the agreement, it was one for the working of the mine on the shares, and the parties became tenants in common of the products of the mine when taken out.---Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all essential features, a contract for labor to be performed and to be paid for by a share of the profits realized from such labor."

The court in that case held, that the mining contract was not a mining lease but a contract for labor, and that the parties thereto were tenants in common, without giving any real legal reason therefor. "Tenants in common are generally defined to be such as hold the same land together by several and distinct titles, but unity of possess-

ion, because none knows his own severalty, and therefore they all occupy promiscuously." 2 Bl. Comm. 60. What title did the miners in that case have to the mining claim under the contract, if it was a contract for labor? If it was a contract for labor, the miners were employees of the company. The only interest or title in the mining claim the miners in that case could have, would be a lease, but the court held it was a labor contract. It appears to be a rather peculiar construction, particularly when the court says: "the parties became tenants in common of the products of the mine when taken out." If the parties became tenants in common of the products, which is personal property, then we have tenants of personal property, another peculiar situation. In other words, we have the relation of landlord and tenant without land being involved in any way.

It appears the real reason for the decision in that case is given in the concurring opinion by Mr. Justice Paterson, which is as follows:-

> "I concur. With the money in its treasury for which this note was given, it would be grossly inequitable to allow the corporation, after full performance, practically to retain the money which should have been turned over to H. & B. in specie as their share of the proceeds. I think the corporation is estopped by its acts. Argenti v. San Francisco, 16 Cal. 266."

The corporation contends that the Statute of Frauds on sale of real estate, authority of an agent to sell real estate, and lease of real estate for more than one year, apply

to the case at bar. Where is there a sale of real estate in the instant case? If the leasing of mining ground is the sale of ore in place, or part of the real property, then there never could be a mining lease but it would be a deed, and every so-called lessee of a mining claim, in the past, pressent or future would be the owner of the legal title, or fee, in the ore in the ground which has been, is, or will be leased, (or rather sold and deeded). Such lessees would be the owners in fee, or hold the title, of the ore in place until they sold it by giving a so-called lease, or deed, or it would pass to their heirs or devisees upon their deaths. We have not found any cases supporting the contention of the corporation to that affect. It therefore appears that the leasing of a mine or a mining claim is not a sale of real estate. But, we have found several cases and authorities holding that a mining lease is like any other lease,-i. e., it is a grant of the possession and the use of real property to a lessee for a certain time for rent or royalties.

On the question of a lease for more than one year, we have the uncontradicted evidence in this case, showing that the leased ground would have been completely worked in about ten months from the 26th day of June, 1921, the date of the original sub-lease, if the corporation had not ejected the co-partners from the leased property. It, therefore, clearly appears that the Statute of Frauds on leases for more than one year does not apply.

The evidence in the handwriting of the manager of the corporation, showing the receipt of the royalties from ten seperate carloads of ore, mined, shipped and smelted, confirms the statement of the terms of the lease as given by

the co-partners, and ratifies said lease by said corporation by its acts in writing, covering a period of about seven months. This, as well as the issuance of the certificates of shares of the corporation stock to the co-partners, signed by the corporation, ratifies the acts of its manager, as well as its own acts, in letting this lease to the co-partners which had not expired when three of them were ejected from the leased ground. The corporation in its brief laments the fact that it could not have Mr. Alderson, its manager at one time, to combat our contentions herein. None are more sorry than we are. We wish that he had been at the second trial of this case. Our expierence with him at the first trial would have made him a very valuable witness for the co-partners at the second trial.

Even though if the lease had been under the Statute of Frauds, there is the part performance thereof, which would have been taken it from under the said statute. The evidence is that the co-partners went to work in barren rock, searching for ore. Four of the co-partners worked steadily for at least one month before commercial ore was discovered. When the ore was encountered, then the fifth partner, Frank Tamietti, "the sick man," became well and started to work. The five partners and one employee, Mr. Ardenson, making three on a shift, worked steadily until the 16th day of January, 1922, when Batt Tamietti, Pete Gaido and Lawrence Monzetti were ousted and kept from going on with said sub-lease. In that period of time ten railroad carloads of ore had been shipped from the leased ground by the co-partners while doing development work mostly, and practically no stopping, except for

an area of about twenty feet long by twenty feet high in the hanging-wall lead or vein. The winze had been sunk as well as the sump, the drift of about one hundred feet on the vein of ore had been dug and timbered, and ore chutes and slides had been constructed to catch and carry the ore when it would be stoped down from said vein and carried into ore cars. A cross-cut into the foot-wall had been dug and timbered, and considerable other work had been done by the co-partners preliminary to the stoping of the ore in said veins. In other words, they had done the hard work and were ready to reap the benefit of their labor when the corporation ousted them and stole thousands of dollars worth of ore from the co-partners, Batt Tamietti, Pete Gaido, Lawrence Monzetti. On the other hand, Frank Tamietti, "the sick man," for some reason or other, became a beneficiary of the said acts of the corporation, to what extent, we do not know, and in all probability will never know; but in his eagerness to testify in this case, he said, "They" (Pete Gaido, Batt Tamietti and Lawrence Monzetti) "came to me and wanted me to sign with them, and fight the case, but I said I would have nothing to do with it. I said the Crystal Copper Company, the manager, treated me good, and I got nothing to say against it. I said 'If you want to fight it go ahead and do it yourself', We (Frank Tamietti and others who received the benefit of the ejected co-partners' work) got fifty feet more than we asked for. I received all the stock and settled for all the stock I agreed to take." (Tr. 172).

On the question of part performance of a contract, tak-

ing it from under the Statute of Frauds, we have the following cases in point:-

> "At the time defendant took possession of the preises the unexpired term of the lease exceeded one year, and therefore there cannot be any doubt that the statute of frauds applied in the first instance (Fliner v. McVay, 37 Mont. 306; 15 Ann. Cas. 1175), but the decided weight of modern authority and the better reasoning support the view that partial performance under the assignment invalid because not in writing, may render the tenant liable according to the terms of the lease. (Edwards v. Spalding, 20 Mont. 54; 49 Pac. 443; 16 R. C.L. 853 etc.) If, then, partial performance will take the case out of the statutes, a fortiori will complete performance do so.
>
> "The statute of frauds was never intended to cloak fraud, but to prevent it. Its aim was to avoid the assertion of claims which from the very nature should be evidence only by an instrument in writing signed by the party to be charged or his agent thereunto duly authorized. But when a tenant has occupied the demised premises voluntarily for the full term of the lease, he may not invoke the invalidity of the contract to shield him from payment of rent."
>
> Wells v. Wadell, 59 Mont. 436, 442.

ASSIGNMENT NO. 2.

Under assignment No. 2, the corporation contends, that both a license and a contract for labor are the conditions which apply to its position in this case. This seems a rather peculiar situation that the co-partners are both lic-

ensees and working under a contract for labor. The cases they have cited and quoted from, have held that the miners were either licensees or working under a contract for labor, -not that they were both licensees and employees.

In support of its contention that the relation of master and servant existed in this case, it quoted on page 86 of its brief from the smelter returns, where deductions were made from the "leasers one-half", or in other words, the co-partners' share, for the Industrial Accident Board Fund, under the Workmens' Compensation Law. This evidence shows that the co-partners were leasers from the corporation and not employees of the corporation. If the contention of the corporation that the co-partners, or "leasers," were employees of the corporation, then the corporation was guilty of the crime of a misdemeanor, at least sixty times, under the said facts and the following section of the Revised Codes of Montana, 1921, to-wit:

> "It shall be unlawful for the employer to deduct or obtain any part of any premium required to be paid by this act from the wages or earnings of his workmen, or any of them, and the making or attempt to make any such deduction shall be a misdemeanor, except that nothing in this section shall be construed as prohibiting contributions by employees to a hospital fund, as elsewhere in this act provided."

Sec. 2937 Rev. Codes of Mont. 1921.

By its contention, it appears to us, the corporation is taking in too much territory,-not even territory leased to others.

ASSIGNMENT 3-4-6-7.

ON THE RIGHT TO RECOVER MORE THAN NOMINAL DAMAGES.

The way the corporation threats this title, it does not seem to consider it material to the case,-or at least secondary in importance.

There were estimates made, that there were about 1000 tons of ore left in the hanging-wall vein, of about the same value as the ore already shipped to the smelter in ten carloads, and the returns thereof received and in the evidence in this case; (Tr. 94-98, and 124) about the same amount of ore was estimated, to be left in the foot-wall vein, of about one-half of the value in the hanging-wall vein, at the time the co-partners were ejected. We proved that the wage scale in Butte, Montana, for the miners, at that time was $4.75 per day. (Tr. 110) We introduced the smelter returns, or at least part of them, of the ore taken out of the leased ground after the co-partners had been ejected, showing that three, and probable six, carloads of ore had been shipped from the leased ground, giving the amount of tonnage, value of the ore therein, time for extracting it, costs of loading, costs of transportation to the smelter, costs of treatment of the ore at the smelter, the royalties to the owners of the Goldsmith Mine, royalties to the corporation and the balance to the miners. These facts certainly were facts sufficient to prove the damages to the co-partners in this case. By proving this, we went farther than was legally required of us, in view of the facts that it was proven that the corporation had had the leased ground entirely worked. (Tr. 169) This being the situation, it was incumbent upon the defendant to prove

what was the amount and value of the ores extracted, according to the case of Isabella Gold M. Co. vs. Glenn, and is in part as follows:-

> "But if the evidence were more indefinite than it is, we would not disturb the verdict because, in the circumstances, the eviction being proved and the extraction of large bodies of ores by the defendant and its other tenants being shown, the burden was upon defendant to prove the amount and value of the ores which it and its lessees removed during the term of plaintiff's lease, and it entirely failed to discharge that duty."
>
> Isabella Gold M. Co. v. Glenn, 37 Colo. 156; 86 Pac. 349.

We respectfully submit that there is a valid mining partnership and a valid mining sub-lease in this case, and the co-partners have been damaged by the actions of the corporation in ejecting them from the leased property, and errors were committed by the trial court at the trial as contended by the co-partners in their brief under the Cross-writ of Error in this case, and therefore, this case should be reversed and remanded for a new trial.

Respectfully submitted,

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